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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
-----x

3 ROBERT GINGHER ,

4 Plaintiff,

5 v.

15 CV 2706 (GHW)

6 DICKSTEIN SHAPIRO, LLP, ET  
7 AL.,

8 Defendants.  
-----x

9 New York, N.Y.  
10 June 2, 2015  
11 10:06 a.m.

12 Before:

13 HON. GREGORY H. WOODS

14 District Judge

15 APPEARANCES

16 SCOTT M. MISHKIN  
17 Attorney for Plaintiff

18 DEBORAH KELLY  
19 Attorney for Defendants

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1 (In open court)

2 (Case called)

3 MS. KELLY: Deborah Kelly for Dickstein Shapiro.

4 MR. MISHKIN: Good morning, Judge. My name is Scott  
5 Michael Mishkin. I'm here for plaintiff, Robert Gingher.

6 THE COURT: Good morning. So we're here for an  
7 initial pretrial conference in this matter. There is also a  
8 pending request for a conference with respect to the  
9 defendants' proposed motions to dismiss and for sanctions. I  
10 will turn to that in due course.

11 What I'd first like to do is to do what I do in all  
12 initial pretrial conferences, which is to afford the parties an  
13 opportunity to describe for me or provide me with a brief  
14 outline of the case and to highlight any issues of particular  
15 importance that we'd like to highlight.

16 So I'm going to turn to you first, Mr. Mishkin, to  
17 allow you the opportunity to do so. Understand that I've read  
18 the complaint and the other materials that have been submitted  
19 today.

20 Proceed.

21 MR. MISHKIN: Thank you, Judge.

22 It's plaintiff's position that, number one, he was  
23 discriminated against based upon his sexual orientation as  
24 you're aware, as pled, his gender, and his age in that younger  
25 similarly situated protected classes, if you will, were

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1 promoted to partner and plaintiff was not, where he had more  
2 qualifications, he's alleging, than they did and was actually  
3 told by defendant that they're looking to go in a diverse way  
4 and he's not going to make the partnership and he was shortly  
5 thereafter terminated.

6 THE COURT: Thank you. By sexual orientation what are  
7 you referring to?

8 MR. MISHKIN: There were individuals that were  
9 promoted that were gay or lesbian, if you will, and my client  
10 is not.

11 THE COURT: Thank you.

12 MR. MISHKIN: Also, your Honor. Of course we're here  
13 on the bonus issue pursuant to the FLSA, and it was -- my  
14 interpretation of the FLSA was that plaintiff, you know, as a  
15 practicing attorney was exempt from claiming a FLSA claim.  
16 However, based upon the regulations and the case law when  
17 defendants gave him his discretionary bonus interpreted the  
18 statute and its regulations to provide argument that defendant  
19 waived or was estopped from bringing the claim as exemption  
20 under the FLSA and he didn't get his bonus. The bonus that was  
21 given to him by defendants turned out to be discretionary  
22 because it wasn't his entire bonus. So that's the underlying  
23 claim for the FLSA. But I know you were going to approach the  
24 other issue but if I may address it now because I'm speaking,  
25 your Honor?

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1                   THE COURT: Which issue is that, sir?

2                   MR. MISHKIN: The issue of the motion to dismiss  
3 because it falls within my claim of the FLSA.

4                   THE COURT: Thank you. I'd like to hear from the  
5 defendant first and then we'll have ample opportunity to  
6 discuss your arguments regarding the FLSA.

7                   While you are in the middle of your presentation,  
8 though, if I can, Mr. Mishkin, can you please explain to me the  
9 basis for your claim that diversity jurisdiction exists in this  
10 case.

11                  MR. MISHKIN: Yes, your Honor.

12                  The defendant is a Washington, D.C. corporation, of  
13 course, and the majority of the defendants, including the  
14 individual defendant that told plaintiff they were looking for  
15 diversity and not promoting him to partner, were in Washington,  
16 D.C.

17                  THE COURT: I'm sorry. You just said two things that  
18 do not make sense to me. You said that Dickstein Shapiro is a  
19 Washington -- is a corporation and you said that the people  
20 were located in D.C. The issue, of course, with respect to  
21 diversity jurisdiction is residence. Can you please make your  
22 comment again with reference to the correct legal terminology.

23                  MR. MISHKIN: Yes. The individual defendants reside  
24 in Washington, D.C. and the corporation principal place of  
25 business is in Washington, D.C. The two named defendants for

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1 the resident in New York has to be cured and the complaint has  
2 to be amended.

3 THE COURT: Pardon me. Would you please state that  
4 again.

5 MR. MISHKIN: Yes, Judge.

6 The named defendants reside, the majority of them  
7 reside in Washington, D.C. And the corporation, the principal  
8 place of business and conducts business in Washington, D.C.  
9 The two named defendants that reside in New York that were  
10 named in this case should not be included in the complaint and  
11 we're looking, of course, to request leave from your Honor to  
12 amend the complaint to cure that as well as other issues in the  
13 complaint.

14 THE COURT: So, can I restate what you've just said to  
15 make sure I understand it?

16 MR. MISHKIN: Yes, Judge.

17 THE COURT: Under the complaint as filed diversity  
18 jurisdiction does not exist because it names defendants who are  
19 not diverse as to the plaintiff; is that correct?

20 MR. MISHKIN: Yes, Judge.

21 THE COURT: So diversity jurisdiction does not exist  
22 with respect to the complaint as filed; is that correct?

23 MR. MISHKIN: Yes, Judge.

24 THE COURT: Thank you.

25 Can I please turn to you, counsel, for your review of

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1 the case?

2 MS. KELLY: Yes, your Honor. We ask the Court's  
3 permission to file a motion to dismiss because we believe this  
4 case is an effort to bootstrap its way into federal court on  
5 the basis of a federal law that absolutely does not apply to  
6 someone who is functioning as a lawyer. Indeed the complaint  
7 here is that Mr. Gingher was functioning at such a high level  
8 that he deserved to be a partner. And it is quite clear in  
9 this Second Circuit that a -- the only thing he seeks here is a  
10 bonus and there's clear law in the Second Circuit what the  
11 Federal Labor Standards Act applies to minimum wage and  
12 overtime, neither of which Mr. Gingher seeks. And it is black  
13 letter law that lawyers are exempt under the FLSA so he could  
14 not be seeking either of those. And that is so apparent that  
15 the counsel's effort even in his opposition brief, which we  
16 just received, and his papers that we just received, he states  
17 legal fiction which is that if you give someone a bonus that's  
18 discretionary it transports an exempt employee into being a  
19 nonexempt employee. There is no such law. That would make  
20 every CEO in the company automatically eligible for protection  
21 under the FLSA. And the cases he cites have nothing to do with  
22 the facts of this matter. Bonuses are relevant when someone is  
23 eligible for overtime, and they should be calculated in the  
24 regular rate of pay. That has nothing to do with this case.  
25 That has nothing to do with what even he claims.

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1           The second matter your Honor has already addressed  
2 which is when this complaint was filed the coversheet showed  
3 that plaintiff's counsel knew well that two of the defendants  
4 resided in New York nonetheless asserted in the complaint that  
5 there was diversity jurisdiction which doesn't exist here.

6           So because this is -- we will move to dismiss on the  
7 grounds that the FLSA absolutely doesn't apply according to the  
8 law of this jurisdiction. There is no diversity. Even if  
9 counsel amends this pleading to eliminate diversity, that  
10 doesn't cure the flagrant use of the FLSA to be applied to an  
11 attorney who thinks he should be a partner in a firm who comes  
12 here arguing that he didn't get a bonus.

13           THE COURT: Thank you.

14           Mr. Mishkin.

15           MR. MISHKIN: Yes, Judge.

16           Plaintiff understands defendants' argument, of course,  
17 and respects it and as put forth in their premotion letter and  
18 the argument today and as I responded to same. But, your  
19 Honor, plaintiff's position respectfully requests that in lieu  
20 of granting defendants' request to submit a motion to dismiss  
21 that plaintiff be granted an opportunity for leave to amend his  
22 complaint within 21 days as of today.

23           Plaintiff's intentions are not frivolous, Judge, and  
24 believes his causes of action had merit and creates a civil  
25 cause of action and that the complaint contains sufficient

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1 factual matter to state a claim for relief. And with that, in  
2 order to streamline this, if you will, without having to brief  
3 a motion and such pursuant to your judge's individual rules  
4 respectfully stating that once a motion to dismiss is submitted  
5 I believe opposing counsel has 21 days to amend, I would  
6 respectfully request that period now to amend the complaint,  
7 your Honor.

8 THE COURT: Thank you. Let us discuss that in the  
9 proposed motion to discuss momentarily.

10 I'd like to give you an opportunity, Mr. Mishkin, to  
11 describe to me and to address the arguments made in your letter  
12 to me dated June 1. You write: "Specifically, defendants paid  
13 plaintiff a discretionary bonus in 2013 which in and of itself  
14 now excludes defendants from claiming plaintiff's bonus was  
15 nondiscretionary and that plaintiff's FLSA claim fails."

16 First, I question your word choice. Excludes does not  
17 appear to be the word you're seeking to use. Second, an  
18 apostrophe after an S is used when you're describing a  
19 possessive. Excludes defendants from claiming. But apart from  
20 those grammatical and typographical errors in that paragraph  
21 it's not apparent to me what the legal basis is for your  
22 argument.

23 Would you please describe to me the basis for your  
24 argument that -- I assume you mean to say that the payment of  
25 the bonus precludes defendants from claiming plaintiff's bonus

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1 was nondiscretionary and why it is that that's meaningful under  
2 the law.

3 MR. MISHKIN: Thank you, Judge.

4 Based upon the argument and what I've read since I  
5 wrote that I've come to realize that plaintiff would have had  
6 to have been subject to the FLSA for minimum wage and overtime  
7 in order for a discretionary bonus to allow him to claim -- to  
8 allow him to be precluded from exemption under the FLSA.  
9 Specifically 788.211(b)(c).

10 THE COURT: I'm sorry would you please tell me that  
11 reference again.

12 MR. MISHKIN: CFR 788(b) and (c), your Honor.

13 THE COURT: What title of the CFR?

14 MR. MISHKIN: 29, your Honor. And that speaks on  
15 discretionary bonuses. And under (b) of that, if the bonus is  
16 discretionary it's not considered the regular rate of pay and  
17 therefore the bonus is not considered to be part of overtime  
18 and is separate and apart.

19 THE COURT: I'd like to hear more about that. In your  
20 paragraph you say that defendants paid plaintiff a  
21 discretionary bonus which in and of itself now excludes  
22 defendants from claiming plaintiff's bonus was  
23 nondiscretionary. Would you please just tie this two comments  
24 together.

25 MR. MISHKIN: Yes, Judge.

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1           Defendants paid plaintiff, by their discretion, if you  
2 will, a portion of a bonus of \$42,000 when he was owed on or  
3 about \$100,000. So that was my argument, to make it  
4 discretionary, because plaintiff didn't agree to it. Thereby,  
5 under 788.211, my argument was that it made it discretionary.  
6 But as I've stated to the Court that statute only would apply  
7 if my client was claiming minimum wage or overtime under the  
8 FLSA. I can't use the statute here because the first prong  
9 isn't met. That's my understanding.

10           THE COURT: Thank you.

11           Before I explore further the points made in your  
12 letter dated June 1, yesterday, am I understanding correctly  
13 that you are no longer asserting that there is a viable basis  
14 for this claim under the FLSA?

15           MR. MISHKIN: Yes, Judge.

16           THE COURT: Thank you. So you expect to withdraw your  
17 claim under the FLSA under any amended complaint?

18           MR. MISHKIN: Yes, Judge.

19           THE COURT: Thank you. I was prepared to spend  
20 additional time on your arguments, Mr. Mishkin. I read the  
21 case that you pointed me to, Callari v. Blackman Plumbing  
22 Suppliers, Inc., which you cite for the proposition that the  
23 plaintiff can waive an FLSA claim. First, your citation  
24 reference was incorrect in your letter to me. Second, it was  
25 wholly inapparent to me how it was that the waiver discussed in

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1 that case could be applicable in this case. It was a reference  
2 to, I believe you were referring to the discussion in that case  
3 to a waiver that was based on statutory provision that the  
4 Court described as required to be expressed. Perhaps there is  
5 an additional reference to waiver in that case that was not  
6 apparent to me. I will say that the case that you cited to me  
7 did not clearly support your position.

8 I appreciate the fact that you've now reconsidered  
9 your position between the date that you sent me this letter,  
10 yesterday, and today. So I will not explore it further except  
11 that I do review the legal positions presented to me by counsel  
12 and yesterday you sent me an argument that you now acknowledge  
13 was flawed.

14 MR. MISHKIN: Yes, Judge.

15 THE COURT: So, Mr. Mishkin, I will continue to  
16 remember that as we proceed in this case.

17 MR. MISHKIN: Thank you.

18 THE COURT: So, Mr. Mishkin. Let's discuss  
19 jurisdiction again. As I understand it, you do not intend to  
20 pursue a claim under the FLSA and any amended complaint. What  
21 would be the basis for jurisdiction with respect to any amended  
22 complaint in my court as opposed to a state court which has  
23 capacity to hear cases between people who are not diverse that  
24 arise under state law?

25 Proceed.

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1                   MR. MISHKIN: Thank you, Judge. It would be complete  
2 diversity jurisdiction, your Honor.

3                   THE COURT: The basis being?

4                   MR. MISHKIN: The defendants are residents  
5 out-of-state and the corporation is out-of-state.

6                   THE COURT: Thank you.

7                   Mr. Mishkin, are you aware of the Supreme Court's  
8 holding in Hertz with respect to the citizenship of Limited  
9 Liability Partnerships and LLCs?

10                  MR. MISHKIN: No, Judge. I will become aware of it.

11                  THE COURT: As you research that you will discover, I  
12 expect, that the citizenship of a Limited Liability Partnership  
13 and a Limited Liability Company is not the citizenship of the  
14 state of organization of that entity but rather the citizenship  
15 of each of its partners or members. So as you are asserting  
16 diversity jurisdiction with respect to the global law firm of  
17 Dickstein Shapiro LLP, to the extent that you seek diversity  
18 jurisdiction in this court, you will need to make appropriate  
19 allegations regarding the citizenship of that entity in  
20 accordance with the very long-established, clear-cut law that  
21 governs in this area that you are unaware of. So to the extent  
22 that you, in reviewing this matter, Mr. Mishkin, conclude that  
23 you do not have a basis for diversity jurisdiction and that you  
24 do not have an FLSA claim as you've already conceded, you may  
25 wish to consider pursuing this case in a court that has

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1 jurisdiction over your client's claims.

2 MR. MISHKIN: Thank you.

3 THE COURT: That will be your and your client's  
4 decision.

5 MR. MISHKIN: Thank you, Judge.

6 THE COURT: Thank you.

7 Good. Now, with respect to the motion to dismiss. As  
8 I understand it, Mr. Mishkin wishes to amend the complaint and  
9 he, of course, has the right and opportunity to do so. I'd  
10 like to set a schedule for that. Of course, under the rules,  
11 Mr. Mishkin, you have 21 days after the date of a responsive  
12 pleading for a motion to dismiss to amend your complaint as a  
13 matter of course. That's Rule 15(a)(1)(B), as you're aware.  
14 In other cases, a party may amend a pleading only with the  
15 opposing party's written consent or with the Court's leave.  
16 That's provided under Rule 15(a)(2).

17 So, Mr. Mishkin, what I'm going to do is accept your  
18 proposal after I've heard from counsel for the defendants to  
19 allow you the opportunity to amend your complaint in this court  
20 should you seek to continue to pursue this action in this  
21 court. I'm going to, under the authority of Rule 16, establish  
22 a date by which any amendments must be completed. That order,  
23 I understand, which I'm going to enter under Rule 16, will  
24 provide a clear-cut deadline for amendments as a matter of  
25 course. And I would not expect to grant additional leave to

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1 amend the complaint absent exceptional circumstances. You are  
2 aware of the expected arguments of defendants, although you'll  
3 have the opportunity to discuss this process should the case  
4 proceed in this court going forward.

5 Mr. Mishkin, before I turn to your colleague with  
6 respect to her views on the proposal can I ask you how much  
7 time you need to amend your complaint and to file the amended  
8 complaint?

9 MR. MISHKIN: Can I have -- I'm requesting 21 days,  
10 Judge.

11 THE COURT: Thank you. Would you mind, please,  
12 summarizing for me the anticipated changes to the complaint.

13 MR. MISHKIN: Removal of the FLSA causes of action,  
14 pleading correctly the diversity and the removal of the two  
15 individuals with the citizenship issue, and possibly adding a  
16 cause of action under New York City administrative code because  
17 my client did work here in New York. That's it, Judge.

18 THE COURT: Good. Thank you very much.

19 Counsel can I turn to you with your views with respect  
20 to the plaintiff's requests at this point.

21 MS. KELLY: Yes, your Honor. I think what plaintiff  
22 has said today -- it's difficult but it shows that had we had  
23 an opportunity to file for Rule 11, this is it. He's filed a  
24 claim, had plenty of opportunity. We've had phone discussions  
25 and still as of yesterday persisted in creating a legal fiction

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1 argument on a statute that doesn't apply and diversity that  
2 doesn't exist. Now I don't know what's left because when you  
3 take away diversity and you take away the federal case, why are  
4 we here wasting the federal court's time when we should be in  
5 the New York Supreme Court. So I fear we're going to be back  
6 here again because I have no idea what this thing will look  
7 like that gets submitted because there is no federal anything  
8 here, your Honor.

9 THE COURT: Good. Thank you very much.

10 So do you have a view with respect to the 21-day  
11 window that Mr. Mishkin has requested to file his amended  
12 complaint?

13 MS. KELLY: No, other than what I've said, I can't  
14 imagine what it will be. No, the date doesn't trouble us.

15 THE COURT: Thank you very much.

16 So, Mr. Mishkin, I'm going to grant your request. And  
17 I'm going to grant you leave to the extent that I'm required to  
18 do so to file your amended complaint. Any such amended  
19 complaint must be filed no later than 21 days from today which  
20 would be Tuesday, June 23.

21 In the interim, Mr. Mishkin, let me recommend to you  
22 that you review the law that applies to diversity actions,  
23 required showings and pleadings. To the extent that you are  
24 unable to affirm as required to as counsel pursuant to Rule 11  
25 that the materials that you present to this Court are, in the

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1 words of the rule: Not being presented for any improper  
2 purpose such as to harass, cause unnecessary delay or  
3 needlessly increase the cost of litigation. Certification of  
4 the claims and other legal contentions are warranted by  
5 existing law or by nonfrivolous argument for extending,  
6 modifying or reversing existing law, and that the factual  
7 contentions have evidentiary support.

8 You will review Rule 11. You will review the law that  
9 relates to diversity actions and the jurisdiction of this court  
10 given that there is no federal question. And if you find that  
11 there is a valid basis for pleading diversity jurisdiction in  
12 this case, having done that work, you should of course feel  
13 free to do so.

14 If, however, in your review you determine that this is  
15 not the appropriate forum to pursue this -- in which to pursue  
16 this action you, of course, are free to dismiss the action  
17 under Rule 41(a)(1)(A)(i) because the defendants have not yet  
18 answered and to pursue your case in another forum.

19 If you choose to proceed we will have another initial  
20 pretrial conference following your submission of the amended  
21 complaint and we'll proceed apace. Good.

22 Is there anything else that we should discuss with  
23 respect to this matter?

24 Mr. Mishkin?

25 MR. MISHKIN: No, Judge.

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1 THE COURT: Thank you very much.

2 MS. KELLY: No, your Honor.

3 THE COURT: Thank you very much.

4 With that we are adjourned.

5 (Adjourned)

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